80-6298

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IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1981

NO.

Lois Mae Mills, Appellant

v.

Dan Habluetzel, Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS

OF TEXAS

JURISDICTIONAL STATEMENT

MARCH, 1981

Michael S. Mankins

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IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1981

NO.

Lois Mae Mills, Appellant

v.

Dan Habluetzel, Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS

JURISDICTIONAL STATEMENT

Lois Mae Mills, the appellant, appeals from the final judgment of the Court of Civil Appeals of Texas dated January 31, 1980, affirming the Order of Dismissal of the trial court rendered on April 4, 1979. A timely application for a Writ of Error to the Supreme Court of Texas was "Refused. No Reversible Error," on July 16, 1980, and a timely Motion for Rehearing was overruled on December 10, 1980. The Court of Civil Appeals holding was that Section 13.01 of the Texas Family Code, a one year statute of limitation for initiating a paternity suit, is constitutional under the Constitution of the United States, and therefore does not deprive an illegitimate child of equal protection and due process guaranteed by the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Court of Civil Appeals, Thirteenth

Judicial District of Texas, appears in the appendix hereto, p. 5, 6 & 7 infra, a copy of the clerk's letter which states that the trial court was affirmed is contained in the appendix hereto, p. 4 infra.

No opinion was rendered by the Supreme Court of Texas in the course of refusing the Application for Writ of Error. A copy of the notice of refusal of the Application for Writ of Error is contained in the appendix, p. 15 infra. The Supreme Court of Texas overruled the Motion for Rehearing on December 10, 1980. A copy of the notice of the overruling of the Motion for Rehearing is contained in the appendix hereto, p. 16 infra.

The Order of Dismissal, District Court of San Patricio County, One Hundred Fifty-sixth Judicial District of Texas, signed April 4, 1979, a copy is contained in the appendix hereto, p. 1 infra.

JURISDICTION

The refusal of appellant's Motion for Rehearing by the Supreme Court of Texas on December 10, 1980, forever denies appellant the right to sue for paternal child support making the judgment of the Court of Civil Appeals reviewable as a final judgment.

A notice of appeal to this Court was duly filed in the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, and in the Supreme Court of Texas. See p. 17 infra.

This appeal is being docketed in this Court within 90 days from the overruling of the Motion for Rehearing in The Supreme Court of Texas. The jurisdiction of this

Court is invoked under 28 U.S.C. § 1257 (2).

QUESTION PRESENTED

Whether Section 13.01 of the Texas Family Code violates the Fourteenth Amendment of the Constitution of the United States by creating an illegitimacy classification that denies the appellant, an illegitimate child, the right to sue for paternal child support while imposing no such restriction on legitimate children, similarly situated, and without bearing relationship to an important state interest.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

Texas Family Code § 13.01 (Vernon 1975):

Section 13.01. Time Limitation of Suit.

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

Texas Family Code § 14.05 (a) (b) Texas Revised Civil Statutes (1979)

Section 14.05. Support of Child.

(a) The court may order either or both parents to make

periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age in the manner and to the persons specified by the court in the decree. In addition, the court may order a parent obligated to support a child to set aside property to be administered for the support of the child in the manner and by the persons specified by the court in the decree.

(b) If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

Texas Revised Civil Statutes, Annotated. Article 5535.

Art. 5535. [5708] [3373] [3222] Person under disability

If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues either a minor, a married person under twenty-one years of age, a person imprisoned or a person of unsound mind, the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

Amended by Acts 1967, 60th Leg., p. 740, ch. 309, § 3, eff. Jan. 1, 1968.

RAISING THE FEDERAL QUESTION

At the earliest stage possible, the appellant raised

the claim, in an objection to a motion to dismiss in the trial court, that Section 13.01 of the Texas Family Code violates the Constitutional rights of illegitimate children in that such statutes violates those rights set out in the U.S. Constitution by the 14th Amendment: The trial court dismissed appellant's original petition to establish paternity despite appellant's claims, p. 1 infra.

The Fourteenth Amendment claim was reiterated by appellant before the Court of Civil Appeals on Appeal. The Court's opinion states: "We have addressed these issues and found them meritless in the Hernandez case, above mentioned, a companion case to the case at bar. Based on the reasoning set forth in Hernandez, we overrule points of error 1 through 3." p. 7 infra. The opinion of the Hernandez case is contained in the appendix hereto, p. 9, 10, 11, 12, 13 & 14 infra. In Hernandez, the Court said: "Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process." p.12 infra. It thus considered and expressly rejected this federal constitutional claim.

The refusal by the Supreme Court of Texas of the Application for Writ of Error noting "No Reversible Error" indicated that the Court was of the opinion that the application presented no error which required reversal.

STATEMENT OF THE CASE

Lois Mae Mills, and the Texas Department of Human Resources filed a suit affecting the parent-child relationship in the interest of Archie Burton Duncan, a child. Dan Habluetzel was named as Respondent. The purpose of the suit was to establish the parent-child relationship between Archie Burton Duncan and Dan Habluetzel and to obtain child support for the

child.

Suit was filed in the 156th Judicial District Court, Sinton, Texas, on October 6, 1978. On the date of filing, Archie Burton Duncan was one year and one month old. Dan Habluetzel, in due time, filed his written answer and pled the limitation of § 13.01, Texas Family Code. Appellee also filed a Motion for Dismissal on the same day.

The Honorable Rachel Littlejohn, Judge Presiding, sustained Appellee's plea in bar and entered a dismissal against Appellant. See appendix hereto, p. 1 infra.

THE QUESTION IS SUBSTANTIAL

The question as to whether a one year statute of limitation on paternity actions invidiously discriminates against illegitimate children so as to deny them the due process and equal protection due under the Fourteenth Amendment is a novel and substantial one. It has never been written on by this Court. However, the fact that there are potential constitutional problems which exist with a statute of limitations on paternity actions appeared to be acknowledged by this Court in footnote 5 to the decision in Lalli v Lalli, 439 U.S.259 (1978). In that footnote, the Court noted that the constitutionality of New York's two year statute of limitations was not before the Court in that case because the New York Court of Appeals had not passed on it. Further the Court noted several times in the case of United States v Clark, 100 S. Ct. 895 (1980), that imposing legal restrictions on illegitimate children which are not equally applicable to legitimate children raises serious equal protection problems and is open to constitutional question.

The classification created by the statute in question

is unconstitutional because it is based on illegitimacy and does not bear an evident and substantial relation to the particular interests the statute is designed to serve. The denial of equal protection by Section 13.01 of the Texas Family Code manifests itself in two ways. First, the statute prevents an illegitimate child over one year of age from being able to obtain child support from his natural father. This right is available to legitimate children in Texas. The failure of the state to provide equal access to support on behalf of both legitimate and illegitimate children violates this Court's holding in Gomez v Perez, 409 U.S.535 (1973). The second violation is the fact that the one year statute of limitations on paternity actions is the only statute of limitation applicable to civil action on behalf of children which is not tolled during the minority of the child. The failure to provide an illegitimate child with a meaningful opportunity to have his paternity judicially established violates this Court's rule, "that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v Connecticut, 401 U.S.371, 377 (1971).

The Texas courts in upholding Section 13.01, Texas Family Code as constitutional have stated that the prevention of stale or fraudulent claims is in the state's interest. These same courts have never explained why all other civil statutes of limitation which are tolled during minority except the statute of limitation on paternity actions don't have the problem of stale or fraudulent claims. This Court has several times held that the blanket and conclusive

exclusion of a certain class of illegitimates was not reasonably related to the prevention of spurious claims or prevention of fraud. Jimenez v Weinberger, 417 U.S. 628 (1974), United States v Clark, 100 S. CT. 895 (1980).

Numerous times this Court has struck down statutes which discriminated against illegitimates declaring that the statutes violated the equal protection clause. In Levy v Louisiana, 391 U.S.68 (1968) and Glona v American Guarantee and Liability Insurance Co., 391 U.S.73 (1968), the Court dealt with wrongful death statutes regarding illegitimates and their mothers. In Webes v Aetna Casualty & Surety Co., 406 U.S.164 (1972), discriminatory workmen's compensation statutes were dealt with. Gomez v Perez, 409 U.S.535 (1973) declared that illegitimates had an equal right to child support and other benefits accorded children generally. Jimenez v Weinberger, 417 U.S.628 (1974) held that blanket Social Security Act exclusions of illegitimates was not reasonably related to the prevention of spurious claims. Trimble v Gordon, 430 U.S.762 (1977) held that intestate succession laws which treated legitimate and illegitimate children differently violated the equal protection clause.

Even in the instances where this Court has upheld state and federal law which had differing treatment of legitimate and illegitimates, this Court has done so with the presumption that the illegitimate children could have legally established their paternity within the lifetime of their alleged fathers. Mathews v Lucas, 427 U.S. 495 (1976) upheld a Social Security Act requirement which required a showing of dependency by illegitimates as well as proof of paternity. In Lalli v Lalli, 439 U.S.259 (1978), the Court upheld a state statute requiring that paternity be judicially established during the lifetime

of the father in order for an illegitimate child to inherit from the father by intestate succession.

This Court has also held that fathers of illegitimate children also have protected interests in the custody and upbringing of their children which cannot be automatically disregarded merely because the children are illegitimate. Stanley v Illinois, 405 U.S.645 (1972), Caban v Mohammed, 99 S. Ct. 1760 (1979). No time limits have been placed on the exercise of these priviledges by the fathers of illegitimate children. However, by failing to strike down the Texas one year statute this Court will in effect have given these fathers rights without a corresponding duty to care for or support their children once the children have attained the age of one year without filing a paternity action.

This Court has previously accorded numerous rights to illegitimate children with regards to their relationship to their natural fathers. These rights are currently meaningless to a substantial class of illegitimate children in Texas by virtue of the one year statute of limitation on paternity actions. The state has yet to set forth a legitimate balancing interest to justify the statute.

The appellant's claim of permanent denial of fundamental rights by a state statute is substantial. The statute discriminates by invidious classification and is not reasonably related to any state interests.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

MICHAEL S. MANKINS

COASTAL BEND LEGAL SERVICES
117 W. Sinton, Sinton, Texas 78387
AC 512 364 3805

6 March 1981

APPENDIX

NO. 20267

IN THE INTEREST OF	§	IN THE DISTRICT COURT OF
	§	
ARCHIE BURTON DUNCAN,	§	SAN PATRICIO COUNTY, TEXAS
	§	
A MINOR CHILD	§	156TH JUDICIAL DISTRICT

ORDER OF DISMISSAL

BE IT REMEMBERED, that on the 16th day of March, 1979, came on to be heard Respondent's and Movant's, DAN HABLUETZEL, plea in abatement and motion to dismiss, and came Petitioner by and through its attorney of record and came Respondent, in person and by his attorney.

It appearing that Petitioner having judicially admitted in its petition that the child the subject of this suit was born on February 12, 1977, and it appearing of record that this suit was filed on October 6, 1978, and after hearing testimony and arguments of counsel, it is the opinion of the Court that Respondent-Movant's plea in abatement and special exception, citing Section 13.01 of the Texas Family Code as the statute of limitation barring the filing of this suit, is well taken, and Petitioner having in open Court having admitted same, in that this suit is brought after the child has attained the age of one (1) year, and that there are, therefore, no issues in dispute,

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that said Cause herein filed be in all things DISMISSED, with prejudice.

[illegible] Petitioner, for which let

1

App. 1

ITERED:
lume 48-A Page 131+132

11

APPROVED AS TO FORM:

RICHARD D. HATCH
County Attorney
San Patricio County, Texas
Room 102
San Patricio County Courthouse
Sinton, Texas

ATTORNEY FOR PETITIONER

APPROVED AS TO FORM
AND SUBSTANCE:

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ATTORNEYS FOR RESPONDENT

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CHIEF JUSTICE
GERALD T. BISSETT
ASSOCIATE JUSTICE
HORACE S. YOUNG
ASSOCIATE JUSTICE

Court of Civil Appeals

Thirteenth Supreme Judicial District

TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

PAULA K. KUTCHINSKI
CLERK
RUTH G. GIBSON
DEPUTY CLERK
512-888-0416

December 13, 1980

Honorable Winnie Light
District Clerk of San Patricio County
San Patricio County Courthouse
Sinton, Texas 78387

Re: Cause No. 1547
In the Interest of A.B.D.,
A Minor Child
Tr. Ct. No. 20267

Dear Ms. Light:

The judgment in the above cause was affirmed by this Court on January 31, 1980. The mandate is enclosed.

Costs on appeal were adjudged against appellant, Texas Department of Human Resources, with exception of the filing fee from which they are exempt.

Very truly yours,

Paula K. Kutchinski

Paula K. Kutchinski, Clerk

PKK:rg
cc: Honorable Richard A. Hatch
Honorable Lola L. Pomar

Court of Civil Appeals

Thirteenth Supreme Judicial District,

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 31st day of January, 19 80. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 1547 (Tr. Ct. No. 20267)

IN THE INTEREST OF

A. B. D., A MINOR CHILD

on appeal to this Court from San Patricio County, Texas.

* * * * * * *

JUDGMENT

On appeal from the 156th District Court of San Patricio County from an order of dismissal rendered April 4, 1979. Opinion by Associate Justice Gerald T. Bissett.

This cause was submitted to the Court on September 6, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby AFFIRMED against appellant Texas Department of Human Resources.

Costs of the appeal are adjudged against Texas Department of Human Resources. It is hereby ordered that they pay all costs of the appeal from which they are not exempt by statute. It is further ordered that this decision be certified below for observance.

* * * * * * * * *

Shirley Selz, Clerk

FILED
AT 3:20 M. O' CLOCK
FEB 4 1980
CLERK DISTRICT COURT
SAN PATRICIO COUNTY, TEXAS
By ... Deputy

NUMBER 1547

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

* * * * * * * *

IN THE INTEREST OF

A. B. D., A MINOR CHILD

* * * * * * * *

On appeal from the 156th District Court of San Patricio County, Texas

* * * * * * * *

O P I N I O N

The Texas Department of Human Resources [TDHR] sued a man hereinafter referred to as "defendant," alleged to be the biological father of a child, under the provisions of Section 13.01 et seq of the TEX.FAMILY CODE to establish a parent-child relationship between defendant and an illegitimate child whose mother had assigned support rights to TDHR. Defendant filed a "Plea in Abatement" in which he specially excepted to TDHR's petition on the basis that suit was barred by the statute of limitations set forth in TEX.FAMILY CODE, §13.01, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural father must be brought within one year from the birth of the child. [1/] In its "Order of Dismissal" the trial court granted defendant's "plea in abatement and motion to dismiss" with prejudice on the grounds that, while TDHR had "judicially admitted" that the child was born February 12, 1977, suit was not filed until October 6, 1978. The issues before this Court, except for a procedural point which is raised by TDHR and which we shall address first, are identical to those considered and decided by us this day in Texas Department of Human Resources v. Juan Hernandez, cause number 1546. As in that case, we affirm.

1/ Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

By its fourth point of error, TDHR complains of the manner in which the trial court disposed of the case. Specifically, TDHR asserts that, instead of dismissing the lawsuit with prejudice after a preliminary hearing, the trial court should have either allowed TDHR to amend its pleadings or waited for defendant to resort to the summary judgment process. Since the court did neither, TDHR feels that somehow it has been prejudiced and therefore the cause should be reversed. We disagree.

Although defendant's answer to TDHR's original petition is styled a plea in abatement, it is actually a plea in bar. A misnomer of the pleadings is not controlling and the court can look to the substance of the plea and treat it accordingly. Texas Highway Dept. v. Jarrell, 418 S.W.2d 486 (Tex.Sup. 1967); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex.Civ.App.--Dallas 1976, no writ); Rule 71, T.R.C.P. Defendant's contention that TDHR's suit is barred by limitations is a plea in bar because it goes to plaintiff's right to recover. 2 McDonald, Texas Civil Practice, §7.04(A) (I) (1975); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex.Civ.App.--Dallas 1976, no writ). A plea in abatement, on the other hand, would set forth some obstacle to further prosecution of the cause until it is removed. Life Ass'n of America v. Good, 71 Tex. 90, 8 S.W. 639 (1888).

A plea in bar by limitations ordinarily is an affirmative defense. Rule 94, T.R.C.P. Where a pleading, however, affirmatively states facts which demonstrate that the suit is barred, an exception may be used to test the pleadings. Hubler v. City of Corpus Christi, 564 S.W.2d 816 (Tex.Civ.App.--Corpus Christi 1978, writ ref'd n.r.e.); Mueller v. Banks, 317 S.W.2d 254 (Tex. Civ.App.--San Antonio 1958, no writ); 1 McDonald, Texas Civil Practice, §7.19 (1971). That is essentially the situation in the case at bar because TDHR's pleadings show on their face that the child was born more than one year before the petition originally was filed. Ordinarily, when the plea involved is, in truth and fact, a plea in abatement, a court which sustains an exception thereto should not dismiss the suit summarily because

plaintiff has the right to amend and plead additional facts, such as circumstances which would avoid the bar of limitations. Acme Color Art Printing Co., Inc. v. Brown, 488 S.W.2d 507 (Tex.Civ.App.--Dallas 1974, writ ref'd n.r.e.). We recognize the general rule that a plea of limitations should not be sustained at a preliminary hearing unless the summary judgment process is used or the parties agree. Kelly v. Bluff Creek Oil Co., 309 S.W.2d 208 (Tex.Sup. 1958); Piper v. Estate of Thompson, 546 S.W.2d 341 (Tex.Civ.App.--Dallas 1976, no writ). In the case at bar, however, there were no additional facts which plaintiff could have pled in order to avoid the bar of limitations because, as the trial court's order of dismissal indicates, TDHR admitted in open court that the original petition had been brought after the child had attained the age of one year. We have, this day, held (Texas Department of Public Resources v. Juan Hernandez) that the one-year statute of limitations provided for by Section 13.01 of the Family Code cannot be tolled by the child's infancy. In this particular case, therefore, we deem it proper to treat the trial court's order of dismissal as a summary judgment that plaintiff take nothing. See Robinson v. Buckner Park, Inc., 547 S.W.2d 60, 61 n. 1 (Tex. Civ.App.--Dallas, 1977, writ ref'd n.r.e.). The fourth point of error is overruled.

By its points of error 1 through 3, TDHR asserts that Section 13.01 of the Family Code is unconstitutional or, in the alternative, that it is tolled by reason of infancy. We have addressed these issues and found them to be meritless in the Hernandez case, above mentioned, a companion case to the case at bar, decided this day. Based upon the reasoning set forth in Hernandez, we overrule points of error 1 through 3. There being no further allegations of reversible error, the order of the trial court dismissing the suit with prejudice is AFFIRMED.

GERALD T. BISSETT
Associate Justice

Opinion delivered and
filed this, the 31st
day of January, 1980.

Court of Civil Appeals

Thirteenth Supreme Judicial District,

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 31s6 day of January, 19 80. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 1546 (Tr. Ct. No. 20610)

TEXAS DEPARTMENT OF HUMAN RESOURCES, Appellant

V.

JUAN HERNANDEZ, Appellee

on appeal to this Court from San Patricio County, Texas

* * * * * * *

JUDGMENT

On appeal from the 36th District Court of San Patricio County from a judgment rendered March 29, 1979. Opinion by Associate Justice Gerald T. Bissett.

This cause was submitted to the Court on September 6, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below and said judgment is hereby AFFIRMED against appellant Texas Department of Human Resources.

Costs of the appeal are adjudged against Texas Department of Human Resources. It is hereby ordered that they pay all costs of the appeal from which they are not exempt by statute. It is further ordered that this decision be certified below for observance.

* * * * * * * *

Shirley Selz, Clerk

NUMBER 1546

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

* * * * * * *

TEXAS DEPARTMENT OF HUMAN RESOURCES, Appellant,

V.

JUAN HERNANDEZ, Appellee.

* * * * * * *

On appeal from the 36th District Court of San Patricio County, Texas.

* * * * * * *

O P I N I O N

The Texas Department of Human Resources [TDHR] sued Juan Hernandez [defendant] under the provisions of Section 13.01 et seq of the Texas Family Code to establish a parent-child relationship between defendant and an illegitimate child whose mother had assigned support rights to TDHR. 1/ Defendant filed a motion for summary judgment asserting that the suit was barred by the statute of limitations set forth in Section 13.01 of the Texas Family Code, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural father must be brought within one year from the birth of the child. 2/ The trial court granted the motion for summary judgment, it being undisputed that, while the child was born March 30, 1976, suit was not filed until March 6, 1979. We affirm.

1/ This suit is distinguishable from a bastardy, or filiation, suit. While the successful prosecution of a suit to establish the parent-child relationship pursuant to Section 13.01 et seq of the Family Code would entail legitimation of the child, TEX.FAMILY CODE ANN. §§12.02(c), 13.09 (1975) (Supp. 1980), filiation would not necessarily import legitimacy. See Rodrigues v. Rodrigues, 190 N.E. 20 (Mass. 1934); Waddell v. State, 357 S.W.2d 651 (Ark. 1962).

2/ Section 13.01. Time Limitation of Suit

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred." TEX.FAMILY CODE ANN. §13.01 (Supp. 1980).

Disposition of this cause requires us briefly to review the history of paternity suits, and support rights of illegitimate children in the State of Texas. Prior to January 17, 1973, the law in Texas imposed duties on fathers to support legitimate children but denied that right to illegitimates. Compare Gully v. Gully, 231 S.W.97 (Tex.Sup. 1921) with Home of the Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex.Sup. 1966). This law was invalidated upon constitutional grounds by the United States Supreme Court on January 17, 1973, in Gomez v. Perez, 409 U. S. 535, 93 S. Ct. 872, 35 L.E.C. 2d 56 (1973). In Gomez the court concluded that Texas law violated the constitutional guarantee of equal protection, stating:

> "Once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." (409 U. S. at 538)

Implicit in the Gomez decision was the notion that an illegitimate has a common law right to institute a proceeding for the purpose of showing that the alleged father is the biological father as a necessary requisite to establish a judicially enforceable right otherwise accorded to legitimate children generally. Wynn v. Wynn, 587 S.W.2d 790 (Tex.Civ.App.--Corpus Christi 1979, no writ).

After Gomez the legislature enacted Title 2 of the Family Code governing the parent-child relationship. Tex. Laws 1973, ch. 543 at 1411. Understandably, in drafting Title 2, the legislature considered comprehensive provisions regulating the legal aspects of children born out of wedlock. Despite the Gomez decision, however, such comprehensive provisions were not passed. Instead, the legislative "response" to Gomez was found in Chapter 13 of the Family Code which provided for voluntary legitimation proceedings. Smith, Commentary on Title 2 of the Family Code, 5 Tex. Tech. L. Rev. 389, 418 (1974). It was later held, however, that when the legislature provided judicial relief against the father on behalf of a legitimate child for support, due to Gomez it necessarily provided the same relief on behalf

of an illegitimate child. In the Interest of R__ V__ M__, 530 S.W.2d 921 (Tex.Civ.App.--Waco 1975, no writ). Thus, after the effective date of Title 2, which was January 1, 1974, illegitimate children had judicially enforceable support rights, whether by common law or by statute, against their biological fathers. Gomez, supra; Wynn, supra; In the Interest of R__ V__ M__, supra.

Remaining in a state of flux, the statutory rights of illegitimates were brought into sharper focus by amendments to Chapter 13 of Title 2 of the Family Code, the effective date of which was September 1, 1975. The result was the present involuntary legitimation proceeding found in Sections 13.01 through 13.09 of the Family Code. By enacting Section 13.01 et seq of the Family Code, the legislature attempted to provide a practical framework within which the rights of the alleged father as well as the rights of the illegitimate child are protected. Wynn v. Wynn, supra. The United States Supreme Court said in Gomez that there are

> ". . . lurking problems with respect to proof of paternity. Those problems are not to be brushed lightly aside, but neither can they be made into an impenatrable barrier that works to shield otherwise invidious discrimination."

Section 13.01 of the Family Code, which requires that paternity suits be filed at least one year from the birth of the child, first came under judicial scrutiny with regard to the issue of retroactivity. In Alvarado v. Gonzales, 552 S.W.2d 539 (Tex.Civ.App.--Corpus Christi 1977, no writ), this Court held that Section 13.01 was intended to apply only to those suits to establish the parent-child relationship for illegitimate children born after September 1, 1975, the effective date of the statute. We also held that retroactive application of the limitation statute would violate the constitutional rights of illegitimate children born before the statute took effect.

In Alvarado we were not called upon to determine the constitutionality of Section 13.01 as it applies to children

born after the effective date of the statute. This issue did not come before an appellate court until Texas Department of Human Resources v. Chapman, 570 S.W.2d 46 (Tex.Civ.App.--Dallas 1978, writ ref'd n.r.e.). In Chapman the Court held that the statute of limitations for initiating [illegible]rnity suit did not

deprive an illegitimate child of his constitutional rights to due process and equal protection under either the United States Constitution or the Texas Constitution. In reaching its holding, however, the court expressly reserved judgment on whether the various tolling provisions set forth in the Texas Revised Civil Statutes are applicable to extend the period within which a paternity suit may be filed. 570 S.W.2d at 49, n. 3.

The issue of tolling was both considered and decided shortly after Chapman in Texas Department of Human Resources v. Delley, 581 S.W.2d 519 (Tex.Civ.App.--Dallas 1979, writ ref'd n.r.e.). In Delley the Court was faced with a suit brought on behalf of a child born before the effective date of Section 13.01. Finding itself in agreement with this Court's decision in Alvarado, the Court held that Section 13.01 only applies to children born after September 1, 1975. The Court next held that the proper statute of limitations for suits brought on behalf of children born before the effective date of Section 13.01 is the four-year statute of limitations provided in TEX.REV.CIV.STAT.ANN. art. 5529 (1958). Finally, the Delley court held that the four-year statute of limitations is tolled during the minority of the child as a matter of public policy and by virtue of TEX. REV.CIV.STAT.ANN. art. 5535 (Supp. 1978-79), the general tolling statute.

TDHR's points of error on appeal in the case at bar. Present to this Court the issues of whether Section 13.01 is constitutional and, if so, whether it is tolled during the minority of a child born after the effective date of the law. Regarding the constitutionality of Section 13.01, we, as an intermediate appellate court, choose to follow Chapman, since a writ or error was refused "no reversible error" by the Texas Supreme Court. TDHR's constitutional arguments in the case at bar are virtually the same as its arguments made in Chapman. Section 13.01 is not unconstitutional. We overrule the points of error dealing with alleged violations of equal protection and due process.

We next turn to the argument of TDHR that Section 13.01 should be tolled uring the minority of the child. The action at bar was brought by TDHR, pursuant to an assignment to it by

the child's mother of her rights to child support. This assignment was made pursuant to TEX.REV.CIV.STAT.ANN. art. 695c §18-B(c (Supp. 1979). Nevertheless, it is a "suit affecting the parent-child relationship" because the suit was brought under the Family Code to legitimate the child in order to require support by the biological father. TEX.FAMILY CODE ANN. §11.01(5) (1975). It may be brought by "any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the State. . . and any authorized agency." TEX.FAMILY CODE ANN. §11.03 (1975). Since, however, the essential concern in any case is the best interest of the child, TEX. FAMILY CODE ANN. §14.07(a) (1975), we may assume that, although the action at bar was brought by TDHR, the real party in interest is the child. See Texas Dept. of Human Resouces v. Delley, supra.

Although the child is the real party in interest in this action, however, it would be both illogical and unreasonable for this Court to hold that Section 13.01 is tolled on account of minority. The purpose of this lawsuit is to establish the duty of the biological father to support a child fathered by him and born out of wedlock. Tolling the statute of limitations would simply allow the child to bring suit for child support once he is no longer a child. Furthermore, tolling the statute of limitations would but constitute a disingenuous way of holding Section 13.01 unconstitutional, a conclusion we are not willing to reach in light of the Supreme Court's decision to refuse a writ of error in Chapman for want of reversible error. Moreover, we note that Section 13.01 is an integral part of the same statutory scheme which created the involuntary legitimation proceeding. Where a statute creates a right and also incorporates a limitation upon the time within which the suit is to be brought, the limitation qualifies the right so that it becomes a part of the substantive

law rather than the procedural law. Franco v. Allstate Ins. Co., 505 S.W.2d 789 (Tex.Sup. 1974); Francis v. Herrin Trans. Co., 432 S.W.2d 710 (Tex.Sup. 1968); State of California v. Copus, 309 S.W.2d 227 (Tex.Sup. 1958). Thus, it would be highly improper for this Court to toll, and in effect, emasculate, what is obviously a substantive part of Chapter 13 of the Family Code. TDHR's last point of error, therefore, is overruled.

There is a vast difference between the duties imposed upon a biological father of an illegitimate child and the rights acquired by the child in a successful suit for legitimation, and those duties imposed and rights acquired in a suit for child support only. The points of error before us in this appeal relate solely to Chapter 13 of the Family Code, although, arguendo, the child may have a common law right for support because, when the legislature provided a judicial right against the biological father on behalf of a legitimate child for support [TEX.FAMILY CODE ANN. §§ 4.02, 12.04 and 14.05 (1975 and 1980 Supp.], it necessarily provided the same relief on behalf of an illegitimate child. See Wynn v. Wynn, supra; In the Interest of R__ V__ M__, supra. The only difference is that the illegitimate child must first prove biological fatherhood.

We cannot decide this case on legal theories which are not asserted by the appellant, are not based upon proper pleadings and are not before this Court on proper points of error. Therefore, insofar as this appeal is concerned, it is immaterial whether a common law cause of action for child support which stops short of actual legitimation exists on behalf of an illegitimate child. That issue was not before the trial court, is not before us, and we express no opinion thereon.

The judgment of the trial court is AFFIRMED.

GERALD T. BISSETT
Associate Justice

Opinion delivered and
filed this, the 31st
day of January, 1980.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas July 16, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of IN THE INTEREST OF A.B.D., NO. B-9337

was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

CLERK'S OFFICE - SUPREME COURT

Dec. 10, 1980.

Austin, Texas,

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of IN THE INTEREST OF A.B.D., A MINOR CHILD, B-9337,

was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk